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No. 08-139

Supreme Court, U.S.
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In The

Supreme Court of the United States

TERRANCE HAYES, et al.,

Petitioners,

v.

THOMAS & BETTS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2006, the Louisiana court of appeal rendered a judgment in favor of respondent, reinstating a jury verdict in respondent's favor. This judgment became final and definitive under Louisiana law when the Louisiana Supreme Court denied certiorari. Two years later, the same court of appeal held that its 2006 judgment cannot be "appealed" or otherwise modified. In so ruling, did the court of appeal correctly apply Louisiana law?

LIST OF PARTIES

Respondent is satisfied with petitioners' list of parties, except to note that respondent's correct name is "Thomas & Betts Corp."

CORPORATE DISCLOSURE STATEMENT

Thomas & Betts Corp. has no parent corporation. Tontine Management, L.L.C. owns 12.47% of T&B's stock.

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In re Gramercy Plant Explosion at Kaiser, 792 So. 2d 738 (La. 2001) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 836 So. 2d 109 (La. 2003) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 842 So. 2d 408 (La. 2003) (denying supervisory writ)

In re Gramercy Plant Explosion at Kaiser, 927 So. 2d 492 (La. App. 5 Cir. 2006) (judgment on merits, reversing judgment notwithstanding verdict and conditional new trial, reinstating jury verdict) 3, 12, 14, 18, 19

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In re Gramercy Plant Explosion at Kaiser, 983 So. 2d 1263 (La. 2008) (denying reconsideration of 982 So. 2d 763)

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to entertain petitioners' due-process and equal-protection arguments, because petitioners failed to raise these arguments timely in the Louisiana Supreme Court. *See* 28 U.S.C. § 1257(a); *Cardinale v. La.*, 394 U.S. 437, 438 (1969).

STATEMENT OF THE CASE

On July 5, 1999, a massive explosion occurred at the Kaiser plant in Gramercy, Louisiana, when several large vessels became pressurized far beyond their capacity with superheated steam. A jury would eventually find that the primary cause of the explosion (75%) was Kaiser's decades-long neglect of its pressure-relief systems, including Kaiser's unfathomable decision to disable all the pressure-relief valves serving the vessels that exploded. A secondary cause (25%) was a power failure preceding the explosion, caused in small part (5%) by an electrical contractor's misuse of a product made by respondent, Thomas & Betts Corp. (T&B).

This massive explosion led to massive litigation: several personal-injury suits by Kaiser employees,[1] business-interruption suits by Kaiser's industrial neighbors, suits by Kaiser itself and its reinsurers

[1] The petition erroneously states that the explosion injured "thousands of people. . . ." Pet. for Cert. 3. In fact, the number of injured persons was 29.

(AXA Global Risks U.K. et al.), and several class actions on behalf of people living near the Kaiser plant. Among the many defendants named in these suits were T&B and the electrical contractor who misused T&B's product. These numerous suits were consolidated in the 23rd Judicial District Court in St. James Parish, Louisiana.

The T&B product at issue in the litigation was a one-inch square peel-and-stick adhesive mounting base – commonly referred to as a "sticky back" – used to anchor a nylon electrical-wire tie. Plaintiffs theorized that the root cause of the power failure preceding the explosion was the failure of the sticky backs to adhere to the inside wall of a cabinet containing high-voltage (13.8 kV) bus bars. The allegation against the electrical contractor was that it should have known not to use sticky-backs inside a high-voltage cabinet, because of the possibility that they might come loose over time. The allegation against T&B was failure to warn the electrical contractor of things that, according to plaintiffs, the electrical contractor should have already known.

The trial occurred in the fall of 2001 and lasted six weeks. Before and during trial, numerous settlements occurred, so that by the end of the trial, the only claims left were those of Kaiser, AXA, Kaiser employee Terrence Hayes, and the class-action plaintiffs against T&B and another defendant. The trial ended with a unanimous jury verdict holding T&B blameless for the explosion.

The trial judge signed judgments on the verdict. Rather than appeal, the losing plaintiffs sought relief from the verdict through post-trial motions for judgment notwithstanding the verdict (JNOV), conditional new trial, and change of venue. On December 16, 2002, the trial judge granted JNOV, assigning 25% fault to T&B and fixing plaintiffs' total damages at over $355 million. He also conditionally granted the various motions for new trial and change of venue.

T&B appealed. Hayes cross-appealed, but for reasons unknown, he voluntarily dismissed his appeal.[2] While the case was on appeal, Kaiser went into bankruptcy, and AXA and the other reinsurers purchased AXA's litigious rights against T&B. As a practical matter, this merged Kaiser and the reinsurers for purposes of this litigation.

In due course, T&B prevailed in its appeal, just as it had prevailed before the jury. On March 28, 2006, a unanimous panel of the Louisiana court of appeal reversed the JNOV, reversed the conditional new trial, and reinstated the jury's verdict. *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d 492 (La. App. 5 Cir. 2006).

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[2] *See* Pet. for Cert. App. 32, *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d 492, 497 (La. App. 5 Cir. 2006). While the case was on appeal, the class-action claims against T&B were settled.

Under La. Code Civ. P. art. 2166(A), a judgment of a Louisiana court of appeal becomes final and definitive if the aggrieved party fails to apply to the court of appeal for rehearing with 14 days of notice of judgment and fails to apply to the Louisiana Supreme Court for certiorari within 30 days of notice of judgment. Petitioner Hayes failed to apply to the court of appeal for rehearing and failed to apply to the Louisiana Supreme Court for certiorari. Thus, the court of appeal's judgment became final and definitive as to Hayes on April 27, 2006.

Kaiser-AXA likewise failed to apply to the court of appeal for rehearing. Kaiser-AXA did apply timely to the Louisiana Supreme Court for certiorari, but on June 14, 2006, the Louisiana Supreme Court denied the application. *In re Gramercy Plant Explosion at Kaiser*, 929 So. 2d 1271 (La. 2006).[3] Under La. Code Civ. P. art. 2166(E), this denial of certiorari rendered the court of appeal's judgment final and definitive as to Kaiser-AXA.

At this point, the litigation should have ended. But rather than accept the court of appeal's judgment with quiet dignity and grace, Kaiser-AXA and Hayes have sought to perpetuate the litigation.

After the court of appeal's judgment on T&B's appeal became final and definitive, Kaiser-AXA returned to the trial court and moved for an order of

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[3] *See* Pet. for Cert. App. 74.

appeal from the original, four-year-old, pre-JNOV judgment on the jury verdict. And the trial court granted the appeal. T&B moved to dismiss this appeal on several grounds, including untimeliness, *res judicata*, and the lack of an appealable judgment. The court of appeal granted T&B's motion and dismissed the appeal, finding that there was no appealable judgment. But in language unnecessary to its decision, it suggested that this omission could be remedied by a new trial-court judgment.[4]

Relying on the court of appeal's *obiter dicta*, Kaiser-AXA returned to the trial court, obtained the trial court's signature on a purported judgment on the 2001 jury verdict, and immediately filed a motion for new trial. Hayes likewise filed his own motion for new trial. In response, T&B pleaded *res judicata* and lack of trial-court jurisdiction to overrule a judgment of a superior court, i.e., the court of appeal, on the issue of new trial. After some procedural wrangling (the details of which are not important here), what emerged from the trial-court proceedings were: (a) yet another judgment on the 2001 jury verdict; and (b) a second order granting a new trial.

In response to the new-trial order, T&B applied to the Louisiana court of appeal for a supervisory writ. T&B argued that the trial court had no authority to overrule the court of appeal, which had previously reversed the trial court on the issue of new

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[4] Pet. for Cert. App. 22.

trial. T&B further argued that the court of appeal's 2006 judgment was final and definitive, thus extinguishing Kaiser-AXA's and Hayes's claims against T&B.

In a unanimous decision, the court of appeal granted T&B's writ application, reversed the trial court's order, and decreed that its 2006 judgment was indeed final and definitive, not subject to further modification by any court on any issue.

Kaiser-AXA and Hayes applied to the Louisiana Supreme Court for a writ to review the court of appeal's judgment, raising various state-law arguments. Lacking from this writ application was any argument based on federal law. The writ application contained no citation to the United States Constitution, any decision of this Court, or any other source of federal law.[5] Also lacking from the writ application were the phrases "due process," "equal protection," or any of their synonyms. The only "constitutional right" asserted by Kaiser-AXA and Hayes was the "right to appeal,"[6] a right non-existent under federal

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[5] *See infra* App. 10-13 (table of authorities from writ application). The writ application contains one reference to "decisions . . . [of] the United States Supreme Court . . . ," *infra* App. 14, but no citation to any specific decision of this Court.

[6] *See infra* App. 19 ("constitutionally protected right to appeal"); *infra* App. 22 ("constitutional right to appeal"); *infra* App. 34 ("Violation of Applicants' Right to Appeal"); *infra* App. 44-45 (several references to "right of appeal" or "right to appeal").

law.[7] In a 6:1 decision, the Louisiana Supreme Court denied the writ application.

Kaiser-AXA and Hayes applied to the Louisiana Supreme Court for rehearing and – for the first time – purported to invoke the United States Constitution. But the rules of the Louisiana Supreme Court forbid rehearing from a writ denial.[8] Perhaps for this reason, the Louisiana Supreme Court denied rehearing without addressing Kaiser-AXA and Hayes's belated constitutional arguments.

SUMMARY OF THE ARGUMENT

Kaiser-AXA and Hayes, petitioners, failed to raise their federal-law issues timely in the state courts. This failure is fatal to their petition. They failed to raise any issue of federal law in the Louisiana court of appeal or in their writ application to the Louisiana Supreme Court. The first time they purported to raise their federal-law arguments was in their motion for rehearing in the Louisiana Supreme Court. This motion was unauthorized by the Louisiana Supreme Court's rules, which do not allow for

[7] *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930).

[8] *See* La. S. Ct. R. IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ. . . .").

rehearing following denial of a writ application. Even if the motion were authorized, this Court's caselaw holds that an issue is generally untimely if raised for the first time in a rehearing application in the state's highest court.

Even if Kaiser-AXA and Hayes's due-process and equal-protection arguments were properly before this Court, the arguments would have no merit. Kaiser-AXA and Hayes had ample notice that the court of appeal's 2006 judgment on T&B's appeal would become final, definitive, and unalterable if and when the Louisiana Supreme Court denied certiorari, because the caselaw saying so was on the books for 10 years before the court of appeal's judgment. And despite their protests that they never had the chance to "appeal the verdict," in fact Kaiser-AXA and Hayes had the right, in the course of T&B's appeal, to attack the verdict with any argument supported by the record. And in fact, they did attack the verdict in T&B's appeal, in defense of both the trial court's JNOV and its conditional order of a new trial. The court of appeal considered these arguments and rejected them, finding the verdict to be reasonable based on the evidence presented at trial.

ARGUMENT

1. Kaiser-AXA and Hayes failed to raise a substantial federal question timely in the Louisiana Supreme Court.

This Court may grant a writ of certiorari to review a final judgment or decree by the highest court of a state, but only if the petitioner has properly raised and preserved a substantial federal constitutional issue in the state courts. *See Cardinale v. La.*, 394 U.S. 437, 438 (1969); 28 U.S.C. § 1257(a). The petitioners here have failed to properly and timely raise their purported federal issues in state court. Their writ application in the Louisiana Supreme Court was devoid of any citation to federal law or any invocation of any right provided by federal law.[9] The only "right" they asserted in their writ application was the so-called "right to appeal."[10] But the United States Constitution does not guarantee litigants in state-court civil cases any right to appeal. *See Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth

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[9] *See infra*, App. 10-13 (table of authorities from writ application).

[10] *See* n. 6 *supra* and accompanying text.

Amendment does not require a State to provide appellate review. . . . ").

After the Louisiana Supreme Court denied petitioners' writ application, petitioners attempted to apply for rehearing, and for the first time purported to invoke the United States Constitution.[11] This attempt came too late. The rules of the Louisiana Supreme Court do not allow rehearing from a writ denial. *See* La. S. Ct. R. IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ. . . . ").

Even if the rehearing petition were permissible under Louisiana law, it would still not be a proper vehicle for introducing a federal question. This Court's caselaw holds that, as a general rule, "[q]uestions presented to the highest State court on a petition for rehearing come too late for consideration here. . . . " *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); *see also Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 162-63 (1932) (due-process argument "cannot serve as the basis for review by this Court" when not raised in state supreme court until petition for rehearing).

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[11] *See infra*, App. 58 *et seq.* (motion for rehearing); *infra* App. 62 (citations to decisions of this Court).

2. Kaiser-AXA and Hayes had fair notice that the judgment on T&B's appeal would have the authority of *res judicata*.

On page 6 of their petition, Kaiser-AXA and Hayes suggest that they were "without notice" that the court of appeal's 2006 judgment could be the final judgment in this case, foreclosing a second appeal. This suggestion is specious. The law applied by the court of appeal in rendering the judgment complained of was more than a decade old when the parties were litigating T&B's appeal.

More than 10 years before the court of appeal rendered its 2006 judgment, the Louisiana Supreme Court rendered its decision in *Tolis v. Board of Supervisors of LSU*, 660 So. 2d 1206 (La. 1995). This decision is the basis of the court of appeal's judgment now complained of by petitioners. *Tolis* teaches that a final judgment may be rendered by an appellate court, and that a judgment by an appellate court that decides the merits of the case is a final judgment. *Id.* at 1206. A judgment of a Louisiana court of appeal acquires the authority of the thing adjudged (*res judicata*) when the Louisiana Supreme Court denies certiorari. *Id.* at 1207. Once that happens, no court has jurisdiction, in the sense of power or authority, to modify, revise, or reverse the judgment, even if the judgment is erroneous. *Id.* at 1206-07.

Tolis controlled the proceedings below and compelled the court of appeal to render the judgment now complained of. The court's 2006 judgment was based

not on legal technicalities, but on the merits. The court reversed the JNOV because the jury's verdict was reasonable based on the evidence:

> Despite the trial court's statement, we conclude that reasonable persons, could arrive at a contrary verdict, as this jury did.

Pet. for Cert. App. 41, 927 So. 2d at 500.

> [W]e conclude that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." . . . Accordingly, we find the trial court erred in granting the motion for judgment notwithstanding the verdict.

Pet. for Cert. App. 44-45, 927 So. 2d at 501, quoting *Trunk v. Med. Center of La. at New Orleans*, 885 So. 2d 534, 537 (La. 2004).

The court of appeal reversed the conditional new trial for the same reason: the jury's verdict was reasonable based on the evidence:

> In several recent cases, our supreme court has ruled that when a JNOV is reversed on a determination that the jury's verdict was reasonable in light of the evidence presented, the conditional new trial also should be reversed. We find that reasoning applicable here. . . .

Pet. for Cert. App. 47, 927 So. 2d at 502.

This judgment on the merits became final and definitive as to petitioner Hayes when he failed to

apply timely to the court of appeal for rehearing or to the Louisiana Supreme Court for certiorari. *See* La. Code Civ. P. art. 2166(A). This same judgment became final and definitive as to petitioner Kaiser-AXA when the Louisiana Supreme Court denied its application for certiorari. *Id.* art. 2166(E); *In re Gramercy Plant Explosion at Kaiser*, 929 So. 2d 1271 (La. 2006). In this context, "final" means "not to be altered or undone." *Webster's Ninth New Collegiate Dictionary* 463 (1984). Once final under article 2166, the court of appeal's 2006 judgment became definitive, acquiring the authority of *res judicata*: the thing adjudged. *Wheat v. Caruthers*, 439 So. 2d 1065, 1066 (La. 1983). The court of appeal's latest decision, in accord with *Tolis*, recognizes these unalterable facts.

Kaiser-AXA and Hayes knew or should have known of the 10-year-old *Tolis* decision while litigating T&B's appeal. Their failure to heed its lesson does not raise a substantial federal issue.

3. In the course of T&B's appeal, Kaiser-AXA and Hayes had the opportunity to attack the verdict with any argument supported by the record.

The crux of Kaiser-AXA and Hayes's petition is their complaint that they never had the chance to appeal "the verdict." Their argument betrays a profound misunderstanding of Louisiana appellate procedure.

To begin with, Louisiana law does not permit an appeal of "the verdict." What one appeals is a judgment, not a verdict. *See* La. Code Civ. P. art. 2082 ("Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court."). Although a jury verdict may serve as the basis of a judgment, the verdict itself is not a judgment. Frank L. Maraist and Hon. Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure*, vol. 1, § 13.4 (West 2007).

Here, when the trial court first signed judgments on the jury verdict, Kaiser-AXA and Hayes had the right to appeal. They chose to forgo that right, choosing instead to move for JNOV and conditional new trial. They knew when they filed these motions that, if the motions were granted, the trial court's judgment on the verdict would be vacated, and they would no longer have the opportunity to appeal the judgment on the verdict.

After the trial court granted JNOV and conditional new trial, Kaiser-AXA and Hayes again had the right to appeal, to seek to have the trial court's judgment modified in their favor. In fact, Hayes availed himself of this right and appealed. But for reasons unknown to T&B, he voluntarily dismissed his appeal.[12] Kaiser-AXA, for its part, chose again to forgo its right to appeal.

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[12] *See* Pet. for Cert. at App. 32; *In re Gramercy Plant Explosion at Kaiser*, 927 So. 2d at 496.

T&B did appeal. And after the record was filed in the court of appeal, Kaiser-AXA and Hayes had 14 days to answer T&B's appeal. Under Louisiana law, an answer to an appeal is the functional equivalent of a cross-appeal, giving the appellee the right to seek to have the judgment modified in its favor. *See* La. Code Civ. P. art. 2133(A). But Kaiser-AXA and Hayes chose to forgo answering the appeal.

Even if they were totally satisfied with the judgment in their favor, Kaiser-AXA and Hayes still remained free – as appellees – to attack the verdict with any argument supported by the record, in defense of the JNOV, the conditional new trial, or both. La. Code Civ. P. art. 2133(B) ("A party who does not seek modification, revision, or reversal of a judgment in any appellate court . . . may assert, in support of the judgment, any argument supported by the record. . . . "). Even if an argument was overlooked or flatly rejected by the trial court, they still could have raised it in defense of the trial court's judgment. *Roger v. Estate of Moulton*, 513 So. 2d 1126, 1136 (La. 1987); *RPM Pizza, Inc. v. Automotive Cas. Ins. Co.*, 601 So. 2d 1366, 1370 (La. 1992); *Davis v. Borskey*, 660 So. 2d 17, 21 n. 6 (La. 1995).

Repeatedly in their petition, Kaiser-AXA and Hayes refer to unspecified "errors," rendering the jury's verdict "defective."[13] Whatever these so-called

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[13] *See* Pet. for Cert. 6 ("The jury verdict was so defective . . . "); *id.* at 12 (new trial granted "due to the errors and irregularities

(Continued on following page)

"errors" consisted of – evidentiary rulings, jury instructions, comments of counsel, etc. – all of them could have been raised in the course of T&B's appeal, either to attack the jury verdict in support of the JNOV or to defend the conditional new trial. Even if the verdict were simply wrong, the argument could have been made during T&B's appeal in defense of the new trial. *See* La. Code Civ. P. art. 1972(1) (new trial shall be granted if verdict is clearly contrary to the law and the evidence); Pet. for Cert. App. 63 (trial court citing art. 1972 to justify new trial).

In sum, every argument that Kaiser-AXA and Hayes might make against the verdict today was available to them in T&B's appeal from the JNOV and conditional new trial. Any failure by them to make their arguments timely does not entitle them to re-do the appeal.

4. The court of appeal necessarily considered the sufficiency of the evidence supporting the jury verdict.

Kaiser-AXA and Hayes make the repeated claim that "the appellate court . . . has never reviewed the jury trial under the applicable standards."[14] Even a cursory review of the decision of the court of appeal refutes this contention. The court exhaustively

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that occurred at trial."); *id.* at 15 ("This trial was so fraught with error . . . ").

[14] *See* Pet. for Cert. 6 (argument heading).

reviewed the trial evidence, and analyzed it under a standard of review more favorable to Kaiser-AXA and Hayes than they could ever hope for in a direct appeal of the verdict.

In its decision, the court of appeal identified the task before it in its review of the grant of JNOV by the district court:

> [T]he appellate court must determine whether the 'facts and inferences point so strongly and overwhelmingly in favor of the moving party [Kaiser-AXA and Hayes] that reasonable persons could not arrive at a contrary verdict. If the appellate court determines that reasonable persons might reach a different conclusion, then the district judge erred in granting the motion and the jury verdict should be reinstated.'[15]

A motion for new trial, the court noted, requires a less stringent test than review of a grant of JNOV, as "such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury."[16]

Indeed, T&B's first issue presented to the court made clear what was in contention, asserting that the

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[15] Pet. for Cert. App. 38, 927 So. 2d at 498-99, quoting *Trunk v. Med. Center of La. at New Orleans*, 885 So. 2d 534, 537 (La. 2004).

[16] Pet. for Cert. App. 47, 927 So. 2d at 502, citing *Davis v. Wal-Mart Stores, Inc.*, 774 So. 2d 84 (La. 2000).

trial court usurped the jury's fact-finding function and ignored substantial record evidence.[17]

It is against this backdrop that the court began its work. To assess T&B's claim that the JNOV ignored substantial record evidence and its claim that a "reasonable jury" could have exonerated it,[18] the court – with a full trial record before it – closely examined that evidence. It began by considering the trial testimony of several critical liability witnesses (Excel's William Philyaw, and Kaiser's Ken Scannapiego and John Scanova), and observed that it was the jury's prerogative to assess the credibility of these witnesses.[19]

The court then noted that the jurors physically handled the allegedly defective product (the sticky back), and that they "could decide for themselves" whether its limitations should have been obvious to Philyaw (i.e., whether their verdict was reasonable).[20] The court went on to consider Kaiser-AXA and Hayes's claim that the product was defective because of a deficient warning, and examined the trial testimony of Kaiser's expert (Jerry Householder), and T&B's expert (Jerry Purswell).[21] After considering that testimony, the court concluded that "[a] reasonable jury could

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[17] Pet. for Cert. App. 33, 927 So. 2d at 496.

[18] Pet. for Cert. App. 39, 927 So. 2d at 499.

[19] Pet. for Cert. App. 40-41, 927 So. 2d at 499-500.

[20] Pet. for Cert. App. 41-42, 927 So. 2d at 500.

[21] Pet. for Cert. App. 42, 927 So. 2d at 500.

have decided that a sticky-back, like a nail, does not need the kinds of warnings that Kaiser-AXA argues for."[22]

Lastly, the court of appeal examined Kaiser-AXA and Hayes's claim that the district court was correct to apportion 25% of the fault to T&B, based on their arguments on the merits of the evidence. The court dismissed that contention, but only after closely analyzing the various roles of the instrumentalities causing the explosion, and concluding that unlike Excel (the electrical contractor), T&B could "not have knowr the risk created by the proximity between the CT leads and the high-voltage bus bars." And more: "[S]ince Philyaw . . . never saw any of the warnings or instructions . . . the jury could reasonably find that any alleged deficiency in [them] was not a proximate cause of any of the events."[23]

The court ultimately concluded that the jury's verdict was eminently reasonable: "Considering all of the above factors, we conclude that 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions'" from those advanced by petitioners.[24] On that basis, it reversed the district court's grant of JNOV, and similarly reversed the district court's conditional grant of a new trial.

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[22] *Id.*

[23] Pet. for Cert. App. 44, 927 So. 2d at 501.

[24] Pet. for Cert. App. 44-45, 927 So. 2d at 501.

It is difficult to reconcile Kaiser-AXA and Hayes's claim that the evidence supporting the jury's verdict has never been examined on appeal with the court's detailed discussion of that very evidence. Properly stated, what Kaiser-AXA and Hayes complain of is not that the jury verdict has never been reviewed, but that it was not reviewed in the context of a direct appeal of the verdict – a distinction without a difference. The jury's verdict, and the evidence that supported it, was thoroughly reviewed by the court of appeal. It had to be – how could the court possibly assess the "reasonableness" of the verdict (required in both the JNOV and new-trial analyses) without a consideration of the entire body of evidence?

In short, Kaiser-AXA and Hayes's claim that "[t]he merits of the verdict have never been addressed . . . ," and that T&B's appeal did not involve a consideration of the merits of the jury verdict,[25] reveals a startling misapprehension of the underlying proceedings. This Court should not be similarly beguiled.

5. A second appeal, under a manifest-error standard of review, would serve no legitimate purpose and would be a waste of judicial resources.

As alluded to above, part of Kaiser-AXA and Hayes's displeasure with the proceedings in the state court seems to revolve around the notion that they

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[25] Pet. for Cert. 13.

have been prejudiced because the jury's verdict was not assessed under the "applicable standards." Yet nowhere do they articulate what that standard would be, and how such a review would be substantively different from the review conducted by the court of appeal.

Under Louisiana law, a jury's findings cannot be overturned unless manifestly erroneous or clearly wrong.[26] Taken to its logical endpoint, what Kaiser-AXA and Hayes suggest to this Court is that a verdict that has already been found to be "reasonable," is somehow also "manifestly erroneous." This point is studiously avoided in the petition because of its patent absurdity. The jury's verdict was validated under both the more stringent JNOV standard and the less stringent new-trial standard. Under both standards, it was found to be amply supported by the evidence. Kaiser-AXA and Hayes offer this Court no explanation how a second appellate review of the verdict under the manifest-error standard could possibly yield a different result. They do not because they cannot.

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[26] *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989): "It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable."

The court of appeal thoroughly vetted the challenged verdict under standards of review more advantageous to Kaiser-AXA and Hayes than what they now seek. Finding constitutional error under these circumstances is simply inconceivable.

CONCLUSION

The petition for certiorari suffers from a fatal infirmity: petitioners' failure to raise any substantial issue of federal law timely in the state courts. Their belated attempt to do so did not come until their unauthorized motion for rehearing in the Louisiana Supreme Court. This alone is enough reason to deny the petition without any further consideration. T&B suggests that the Court do just that.

Respectfully submitted,

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App. 1

SUPREME COURT OF LOUISIANA

Docket No.

IN RE:
GRAMERCY PLANT EXPLOSION AT KAISER

On application for Supervisory Writ of Certiorari or Review from the Fifth Circuit Court of Appeal for the State of Louisiana
Docket No. 07-C-893

On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James
State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

Original Writ Application Filed on Behalf of Respondents/Appellants Terrance Hayes, Kaiser Alumina & Chemical Corporation/ AXA Global Risks, et al.

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Civil Case

Volume 1 of 2

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

No. _____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

In re: Gramercy Plant Explosion at Kaiser

VS.

Thomas and Betts Corporation

Applicant: Kaiser/AXA and Terrance Hayes

Have there been any other filings in this Court in this matter? ☑ Yes ☐ No

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a Priority Form

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Pleading being filed: ☐ In proper person.
☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection,
☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile,
☐ Other

☐ CINC, ☐ Termination, ☐ Surrender,
☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____

Judge/Commission/
Hearing Officer: _____

Date of Ruling: _____

DISTRICT COURT INFORMATION

Parish and Judicial
District Court: 23rd Judicial District
Court, Parish of St. James

Docket No. 25,975

Judge and Section: Hon. Pegram Mire, Division D

Date of Ruling/Judgment: October 10, 2007

APPELLATE COURT INFORMATION

Circuit: Fifth Docket No. 07-C-893

Action: Writ granted, Reversed motion for new trial, Dismissed appeal

Applicant in
Appellate Court: Thomas & Betts Corporation

Filing
Date: Nov. 8, 2007

Ruling Date: Jan. 30, 2008

Panel of Judges: Hon. S. Chehardy,
Hon. M. Edwards,
Hon. G. Guidry

En Banc: ☐

REHEARING INFORMATION

Applicant:	Date Filed:	Action on Rehearing:

Ruling Date:	Panel of Judges:	En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/
Trial Scheduled date: If new trial is reinstated, pre-trial status.

☐ Trial in Progress, ☑ Post Trial

If there a stay now in effect? No

Has this pleading been filed simultaneously in any other court? No

If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to the filing. I further certify that a copy of

this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

2/28/08 /s/ Caleb Didriksen
DATE SIGNATURE

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I HEREBY CERTIFY that a copy of the foregoing pleading has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 28th day of February, 2008:

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Appendices

Appendix 1: Judgment of the district court in No. 25,975, signed October 10, 2007 (granting Kaiser/AXA and Hayes a new trial)

Appendix 2: Ruling of the Louisiana Fifth Circuit Court of Appeal in No. 07-C-893 (reversing trial court's grant of a new trial and dismissing Kaiser/AXA and Hayes' appeal)

WRIT GRANT CONSIDERATIONS IN THE PRESENT CASE

There are several writ grant considerations in the present case that weigh strongly in favor of granting this writ application, which include conflicting decisions between the Louisiana Fifth Circuit Court of Appeal, the Louisiana First Circuit Court of Appeal, the Louisiana Fourth Circuit Court of Appeal, the Louisiana Supreme Court and the United States Supreme Court on the same legal issues. There is at least one significant unresolved issue of law that should be addressed by this Court, that of whether the statutory right to file a new trial motion is an empty right after or in conjunction with a JNOV that is reversed. The Fifth Circuit granted a supervisory writ in this matter, reversing its two prior judgments, and held that res judicata barred the trial court's grant of a new trial in this matter and also blocked an appeal of the jury's verdict. The only decision on the merits in this case is the judgment adopting the jury verdict, which has never been appealed.[1] Louisiana Supreme Court Rule X "Erroneous Interpretation or Application of Constitution or Laws" is also implicated by the Fifth Circuit's erroneous application of the res judicata statute, as it will deprive Hayes and Kaiser/AXA of their right to appeal the jury verdict.

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[1] Appendix 2.

1. Conflicting Decisions

The Fifth Circuit's newest decision in this matter **creates conflicts between the Fifth, First and Fourth Circuits, fails to follow controlling Supreme Court law, and conflicts with prior case law in this case.** The Fifth Circuit's decision also conflicts with the **Civil Law Treatise** which cites *Juno v. Morgan*, a First Circuit decision, for the proposition that "the judgment on the jury verdict was 'procedurally in abeyance' when the appeal [of the JNOV] was lodged." 1 La. Civ. Law Treatise § 13.4, n.21 (2006).

The Fifth Circuit denied Kaiser/AXA and Hayes' motion for a new trial, which conflicts with the following authorities: *In re: Gramercy Plant Explosion at Kaiser*, (prior judgment in this case dismissing appeal of Kaiser/AXA due to lack of trial court judgment – requiring trial court to enter judgment on January 16, 2007);[2] *In re: Gramercy Plant Explosion at Kaiser*, (consent judgment in this case dismissing unlodged appeal of Hayes pending trial court issuance of replacement judgment dated September 4, 2007);[3] *Horton v. Mayeaux*, 2005-1704 (La. 05/30/06), 931 So. 2d 338 (discretionary new trials are truly discretionary with trial court); *Carlone v. Carlone*, 444 So. 2d 1274 (La. App. 4 Cir. 1984) (a second new trial can be ordered as there is no statutory prohibition of

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[2] Exhibit C.

[3] Exhibit E.

a new trial on a new judgment); *State ex rel Land v. Martin*, 21 So. 2d 481 (La. 1945) (an order granting or denying a new trial is an interlocutory judgment); *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152 (a party cannot appeal a jury verdict while a JNOV is on appeal); *Strain v. Indiana Lumberman's Mut. Ins. Co.*, 2000-2720 (La. App. 1 Cir. 02/20/02), 818 So. 2d 144; *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 02/20/02), 813 So. 2d 458).

The Fifth Circuit held that both the issue of a new trial and an appeal of the jury verdict were barred by res judicata, which conflicts with the following authorities: *In re: Gramercy Plant Explosion at Kaiser*, (prior judgment (January 16, 2007) in this case dismissing appeal of Kaiser/AXA due to lack of trial court judgment – requiring trial court to enter judgment);[4] *In re: Gramercy Plant Explosion at Kaiser*, (consent judgment of September 4, 2007 in this case dismissing unlodged appeal of Hayes pending trial court issuance of replacement judgment dated September 4, 2007)[5], *Carlone*, 444 So. 2d 1274 (a second new trial can be ordered as there is no statutory prohibition of a new trial on a new judgment); *Martin*, 21 So. 2d 481 (an order granting or denying a new trial is an interlocutory judgment); *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152; *Strain v. Indiana Lumberman's Mut.*

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[4] Exhibit C.

[5] Exhibit E.

Ins. Co., 2000-2720 (La. App. 1 Cir. 02/20/02), 818 So. 2d 144; *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 02/20/02), 813 So. 2d 458) (the jury's verdict can not [sic] be appealed during the appeal of the JNOV as the jury's verdict is vacated by the entry of the JNOV). *State v. Shaddinger*, 97-439 (La. App. 5 Cir. 10/28/97), 702 So. 2d 965 (res judicata only applies to ***final*** judgments ***on the merits*** and not to interlocutory judgments).

The Fifth Circuit's latest decision reversed the trial court's grant of a new trial and denied Hayes and Kaiser/AXA the right to appeal the jury verdict on the grounds of res judicata. This decision conflicts with the principles of res judicata. The Fifth Circuit ignored its previous decision that it rendered on January 16, 2007, which dismissed Kaiser/AXA's appeal until the trial court entered a judgment incorporating the jury verdict.[6] The Fifth Circuit also rendered a consent judgment on September 4, 2007, which specified that dismissal of Hayes' appeal, was "without prejudice to refile after the entry of a replacement judgment by the trial court."[7] Thus, the Fifth Circuit chose to reverse itself from its last two decisions in the case.

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[6] Exhibit C.

[7] Exhibit E.

2. Significant Unresolved Issues of Law

A court of appeal has decided, or sanctioned a lower court's decision of, a significant issues [sic] of law which have not been, but should be, resolved by this court. According to the Fifth Circuits [sic] rulings herein, if a JNOV is reversed: (1) any alternative new trial order is automatically reversed; and (2) there is no right to appeal the jury verdict.[8] This ruling conflicts with *Horton*, *Junot*, *Strain*, *Delco*, and Louisiana statutory law, and creates the following questions of law that should be addressed by this Honorable Court:

1. Does *Horton* apply equally to alternative new trials ordered in connection with a JNOV?

2. If second new trials are permissible under *Carlone*, then res judicata cannot apply to a second new trial.

3. Should the Fifth Circuit decision, which stated that there can be no new trial under any circumstances when a JNOV is reversed be allowed to stand, even though it conflicts with the legislative intent as evidenced by the Code of Civil Procedure, which provides for the opposite result?

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[8] Appendix 2.

3. Erroneous Interpretation

Supreme Court Rule X "Erroneous Interpretation or Application of Constitution or Laws" is also present herein. The Fifth Circuit's decision to erroneously apply the res judicata statute, La. R.S. § 13:4231 will cause material injustice as it will operate to deprive Hayes and Kaiser/AXA of their constitutionally protected right to appeal the adverse jury verdict.

STATEMENT OF THE CASE

This case involves a massive short circuit and explosion at the Kaiser Gramercy plant on July 5, 1999 that caused injuries to thousands of people, including applicant Terrance Hayes, who was blinded, and caused nearly half a billion dollars in losses to Kaiser Alumina and Chemical Corporation, severe injuries to others, including massive life threatening burns to some and more minor injuries to thousands of others. Plaintiffs filed suit against Thomas and Betts ("T&B") in 2000 because the short circuit was caused by the failure of adhesive backed mounts which were designed, manufactured, and sold by T&B. When the T&B mounts failed in normal service, they allowed a low voltage instrument line to contact an 8,000 volt bus bar, which caused a short circuit, and a power failure at the Kaiser plant at night. The Kaiser workers, searching in the dark, were unable to find the source of the power outage fast enough to avoid the explosion.

The matter was tried to a jury, which, through various errors, concluded that T&B was not at fault. The trial court presided over the six week trial, heard and evaluated the evidence, and was well aware of the errors that occurred at trial. The trial court granted a JNOV in favor of Kaiser/AXA and Hayes, found Kaiser/AXA lost $335,000,000 in the event, and Hayes [sic] loss was $20,000,000, and allotted 25% of the fault to T&B, which resulted in a judgment of $88,750,000 million plus interest and costs, for a total judgment of over $120,000,000. The Fifth Circuit reversed the JNOV and conditional new trial in 2006. *In re: Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 03/28/06), 927 So. 2d 492. In late 2006 or early 2007, the appeal of the jury verdict was lodged with the Fifth Circuit.[1] Before briefs were filed, the Fifth Circuit dismissed the appeal on the basis that the record lacked any judgment of the trial court adopting the jury verdict, but mentioned that this could be easily remedied at the trial court level.[2] On September 4, 2007, the Fifth Circuit Chief Judge ordered a dismissal of Hayes' unlodged appeal without prejudice to refile after the trial court replaced the judgment adopting the jury verdict.[3] In 2008 the Fifth Circuit reversed its 2007 judgments and held that there can never be an appeal of the jury verdict, and that the trial court should not have entered a

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[1] Exhibit A.

[2] Exhibit C.

[3] Exhibit E.

judgment adopting the jury verdict in accordance with its own two 2007 judgments, including the consent judgment dated September 4, 2007, and that the new trial should not be granted on the basis of res judicata, again failing to address the legal standard enunciated in *Horton v. Mayeaux.*[4] 2005-1704 (La. 05/30/06), 931 So. 2d 338.

This writ application principally seeks reversal of two issues raised by the most recent Fifth Circuit decision in this matter:

1. Does res judicata apply to this matter and to a subsequent new trial order, or is prior jurisprudence, including *Carlone* and *Horton* valid?

2. Does res judicata automatically prevent any appeal of a jury verdict when a JNOV is reversed?

Applicants request that this court grant their writ because the January 30, 2008 Fifth Circuit decision conflicts with its own prior decisions, Louisiana statutory law, and prior jurisprudence and so should be addressed by this court. The January 30, 2008 Fifth Circuit opinion reversing the new trial order closed with:

> On this basis [res judicata], we hereby grant Thomas and Betts' writ application, reverse the trial court's judgment granting

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[4] Appendix 2.

> respondents' a new trial, and deny respondents' motions for new trial.[5]

Buried within the body of the decision, is a clear violation of plaintiffs' constitutional right to appeal:

> Thus, as of June 14, 2006 [the date the Supreme Court denied writs on the reversal of the JNOV], the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or **any other issue.**[6]

Importantly, the Fifth Circuit had already ruled in the opposite fashion in this case, against T&B, on the res judicata issue on January 16, 2007,[7] and denied rehearing on February 23, 2007. *In re: Gramercy Plant Explosion at Kaiser*, 06-871 (La. App. 5 Cir/ 02/23/07), 2007 La. App. LEXIS 294. The Supreme Court denied T&B's writ on April 5, 2007. *In re: Gramercy Plant Explosion at Kaiser*, 2007-0544 (La. 04/05/07), 954 So. 2d 132. The Fifth Circuit's dismissal of Applicants' appeal that T&B challenged read:

> Mover, Thomas & Betts Corp. ("T&B"), seeks to have us dismiss Kaiser-AXA's appeal on the basis that all issues are res judicata pursuant to our prior opinion, *In re Gramercy. Plant Explosion at Kaiser*, 04-1151

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[5] Appendix 2.

[6] Appendix 2 **(emphasis added)**.

[7] Exhibit C.

(La. App. 5 Cir. 3/28/06), 927 So.2d 492, *writ denied*, 2006-1003 (La. 9/1/06), 936 So.2d 190. In our previous opinion, however, we only addressed the issues of whether the trial court erred in granting a JNOV and new trial in favor of Kaiser-AXA; we reversed the judgment of the district court and reinstated the jury verdict, and the Louisiana Supreme Court subsequently denied writs.

Citing to the First Circuit's opinion in *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152, Kaiser asserts that its first opportunity to appeal the jury's verdict came after the supreme court denied writs from our opinion which reinstated the jury verdict, allowing for all further proceedings or appeals as provided by law.

LSA-C.C.P. art. 2082 provides that an appeal can only be taken from a judgment of a trial court. In the present case, **without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court.**

Accordingly, for the foregoing reasons, T&B's Motion for Dismissal is granted.[8]

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[8] Exhibit C.

There has never been an appeal of the jury verdict, even though the most recent judgment from the Fifth Circuit provides that there can never be such an appeal. The jury verdict of 2001-2002 was vacated by the entry of the JNOV. Therefore, it was not and could not be appealed.[9] T&B appealed the JNOV. The JNOV and alternative new trial from the 2002 judgment was reversed on March 28, 2006. *In re: Gramercy*, 04-1151, p. 3, 927 So. 2d at 494. After the JNOV was reversed, Kaiser/AXA filed a devolutive appeal from the jury verdict, as Kaiser/AXA assumed that the Fifth Circuit decision of March 28, 2006 constituted the rendering of a judgment on the jury verdict. On motion of T&B, the Fifth Circuit dismissed the devolutive appeal of the jury verdict on the grounds that there was no trial court judgment to appeal. As per *Junot*,[10] the 2002 judgment incorporating the jury verdict had been vacated, and no new judgment incorporating the jury verdict was entered. T&B, happy with the dismissal, but unhappy with the reasons for the dismissal, moved for rehearing of the dismissal and for writs to the Supreme Court on the basis that res judicata barred any further trial court action and the appeal. Both the Fifth Circuit and the Supreme Court left the January 16, 2007 decision as it was, and the Fifth Circuit found res judicata did not apply. Both the January 16, 2007 and

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[9] See discussion on pgs. 14-16 under *Junot v. Morgan*, 2001-0237 (La. App. 1 Cir. 02/50/02 [sic]), 818 So. 2d 152.

[10] *Id.*

the September 4, 2007 Fifth Circuit orders clearly anticipate the entry of a trial court order adopting the jury verdict. The 2008 Fifth Circuit decision states the opposite of its own January 16, 2007 and the September 4, 2007 decisions in this same case, and denies Applicants any right to appeal the jury verdict.[11]

When the devolutive appeal of the jury verdict was dismissed for lack of a trial court judgment, with advice that the lack of a judgment could be remedied by the trial court, the Fifth Circuit effectively remanded this matter back to the trial court for entry of judgment in conformance with the jury verdict. T&B admitted in open court that the trial court had jurisdiction on May 14, 2007 to enter a new judgment incorporating the jury verdict: [sic]

T&B acknowledged in open court on May 14, 2007 that the trial court now had jurisdiction to enter a judgment on the jury's verdict:

> THE COURT:
>
> > Are you saying that now I have jurisdiction over it since your writs are completed?
>
> MR. WARD:
>
> > That would be – well, we still have the problem with Mr. Hayes. Kaiser is

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[11] Appendix 2, Exhibit C.

properly before you at this point, I guess, on that issue . . .

MR. WARD:

. . . Your Honor, there's an easy was to straighten this out. The first thing, Mr. Hayes needs to file in the Court of Appeal a Motion to Dismiss an Unlodged Appeal. There is such an animal.

THE COURT:

Correct.

MR. WARD:

It's procedurally possible. He can do that. That will take care of that.

THE COURT:

I agree.

MR. WARD:

The next thing that happens, you sign another judgment on the verdict after we try to work that, and, if necessary, maybe have a contradictory hearing on that. Then, we can go forward. If they want to bring whatever motions they want to bring following that, that would be the way to do that.

T&B then provided the trial court with its own choice of form for that judgment on August 22, 2007.[12] On September 4, 2007, just six months ago, T&B also

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[12] Exhibit D, letter from T&B counsel to Trial Court requesting entry of judgment and attached form.

consented to a Fifth Circuit order dismissing Hayes' unlodged appeal without prejudice to refile after a replacement judgment would be ordered by the trial court.[13]

T&B's own form of new judgment incorporating the jury verdict was entered on September 4, 2007 after Hayes' unlodged appeal was dismissed, as requested by T&B. On September 5, 2007, Hayes and Kaiser/AXA filed timely motions for new trial from the new judgment.[14] The trial court received briefs and heard arguments from all parties. On October 10, 2007, the trial court granted a new trial on purely discretionary grounds as per this court's holding in *Horton v. Mayeaux*.[15] T&B filed a writ application to the Fifth Circuit based on res judicata, which had already been rejected by all Louisiana trial and appellate courts in this case. The Fifth Circuit, which had rejected T&B's identical arguments last year, reversed themselves and accepted T&B's arguments this year, and reversed their own decision of one year ago.[16] This writ application is from the Fifth Circuit's grant of T&B's 2007 writ, in which the Fifth Circuit reversed the grant of a new trial and any appeal

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[13] Exhibit E.

[14] *Id.*

[15] Appendix 1.

[16] Appendix 2.

based upon res judicata, a ground that it previously rejected in this same case.[17]

Res judicata only applies following a final judgment on the merits. La. R.S. § 13:4231 cmt. (d) (2007); *Tolis v. Bd. of Supervisors of LSU*, 95-1529, p. 2-3, (La. 10/16/95), 660 So. 2d 1206-07, *citing* La. Code of Civ. Pro. art. 1841. Res judicata should not apply herein, as there has never been a *final* judgment on the jury verdict, as Applicants' appeal of the jury verdict was lodged after the JNOV was reversed, but has never been briefed or argued.[18] In 2007, the Fifth Circuit dismissed Plaintiffs' appeal just before briefs were due based upon the lack of a trial court judgment adopting the jury verdict.[19] The JNOV reversal related to the appellate process was completed, but the appeal of the jury verdict had not yet taken place. The JNOV reversal was not a **final** judgment on the **merits** of the jury verdict, as the jury verdict had not been in effect or appealed, and was not yet briefed. Different legal standards of review apply to appeals of jury verdicts and to JNOVs.

The Fifth Circuit erred in its order, as new trial orders are interlocutory judgments, so they are not subject to the res judicata defense. *Simmons v. Beauregard Parish School Bd.*, 284 So. 2d 668, 669

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[17] Appendix 2.

[18] See discussion at pgs. 14-16, under *Junot*, 2001-0237, 818 So. 2d 152.

[19] Exhibit C.

(La. App. 3 Cir. 1973), *citing* Official Revision Comments, LSA-C.C.P. Art. 2083; *Foster v. Kaplan Rice Mill*, 203 La. 245, 13 So. 2d 850 (La. 1943); *Pate v. Crescent City Motors Exchange, Inc.*, 256 So. 2d 471 (La. App. 4 Cir. 1972).[20] The Fifth Circuit also erred in holding that res judicata applies to all aspects of this case, effectively denying applicants any right to appeal the adverse jury verdict. The merits of the jury verdict have never been considered by any appellate court.

ASSIGNMENT OF ERRORS

1. The Fifth Circuit erred in determining that its 2006 decision reversing the trial court's JNOV was a final judgment, such that the doctrine of res judicata could be applied to prohibit any appeal of the jury verdict.

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[20] Likewise, the Louisiana Supreme Court has specifically stated, "It is well settled that a judgment refusing a new trial is not appealable. It is not a final judgment and can produce no irreparable injury." *General Motors Acceptance Corp. v. Deep South Pest Control, Inc.*, 173 So. 2d 190, 191 (La. 1965), *citing State ex rel Land v. Martin*, 207 La. 410, 21 So. 2d 481 (La. 1945).

The Louisiana Supreme Court has further held that a judgment or an order granting a new trial is interlocutory and operates only as a postponement or continuance, and further, an order granting a new trial does not cause irreparable injury and no appeal (or writ) lies from an order granting a new trial in cases where the application for a new trial was timely filed. *Foster v. Kaplan Rice Mill*, 13 So. 2d 850, 852 (La. 1943).

2. The Fifth Circuit erred in reversing the trial court's decision to grant a new trial and in denying Hayes and Kaiser/AXA's motion for a new trial, and in reversing the trial court's entry of a new judgment incorporating the jury verdict (as it has been ordered to do by the Fifth Circuit).

SUMMARY OF THE ARGUMENT

This writ application is filed on behalf of Hayes, Kaiser and AXA, and seeks the reversal of the Fifth Circuit decision reversing the trial court's grant of a discretionary new trial and denying a new trial, and ordering that there can never be an appeal of the jury verdict, on the basis of res judicata.

This case itself has conflicting and contradictory decisions from the Fifth Circuit. Not only are there contradictions between the circuits, there are contradictions by the Fifth Circuit in this very case. The January 16, 2007 decision in this case stated that there was no trial court judgment from which to appeal, and stated that situation could easily be remedied. The September 4, 2007 consent dismissal of Hayes unlodged appeal specifically reserved Hayes' right to file his appeal after the trial court entered the replacement judgment.[21] Contradicting its own prior orders on the subject, the judgment from which

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[21] Exhibit E.

this writ is taken states that a reversal of a JNOV alone is a final judgment on the merits that automatically prevents any appeal of the jury verdict.

A conflict exists in the jurisprudence concerning discretionary new trials. This Court declared in *Horton* that a trial judge has almost unlimited discretion to order a new trial, as long as reasonably articulated reasons are given. *Horton*, 2005-1704, p. 10, 931 So. 2d at 344, *citing Burris v. Wal-Mart Stores, Inc.*, 94-0921, p. 11 (La. App. 1 Cir. 03/03/95), 652 So. 2d 558, 562, *writ denied*, 654 So. 2d 562 (La. 1995). In this matter, the Fifth Circuit ruled that no new trial can be granted for any reason in the event that a JNOV is overturned.[22] There is no statutory support for this proclamation by the Fifth Circuit, only jurisprudential support, and this jurisprudence conflicts with statutory law, so it should be reversed or limited. The Fifth Circuit's 2006 decision on conditional new trial also appears to have been overruled by *Horton v. Mayeaux. In re: Gramercy*, 04-1151, 927 So. 2d 492. Both of these subjects are areas of law that would benefit by clear standards being set by this Honorable Court.

Assignment of Error No: 1

Res Judicata

The Supreme Court has repeatedly ruled on res judicata motions and appeals since the mid-1800s. It

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[22] Appendix 2.

is generally a well-established body of law. Neither the law nor the jurisprudence support what the Fifth Circuit has just done.

> The doctrine of **res judicata** precludes subsequent litigation when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is **final**; (3) the parties in the two matters are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.[23]

One of the initial obvious differences between this case and those covered by the general rule of res judicata is that this is not a second suit. We are still in the middle of the original suit. The appeal of the jury verdict, which was lodged and pending, but not yet briefed or argued, was dismissed pending entry of a judgment by the trial court.[24] The Chief Judge of the Fifth Circuit, with the consent of all parties, dismissed Hayes' unlodged appeal without prejudice to

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[23] *Burguieres v. Pollingue,* 02-1385, p. 8 (La. 2/25/03), 843 So. 2d 1049, 1053, *citing* La. R.S. 13:4231; *see also Ken Smith, et al. v. State, DOTD c/w Ken Smith, et al. v. Mike Unkel,* 2004-1317 *c/w* 2004-1594 (La. 03/11/05); 899 So. 2d 516, 529; *See also Wooley v. State Farm Fire & Cas. Ins. Co.,* 04-0882, (La. 01/19/05); 893 So. 2d 746.

[24] Exhibit C.

refile after the entry of judgment by the trial court.[25] The trial court's case numbers never changed. This is still the first suit. No new suit has been filed. "A final judgment is defined in LSA-C.C.P. art. 1841 as one that determines the **merits** in whole or in part. An interlocutory judgment is **defined** as one that does not determine the **merits** but only preliminary matters." *State v. Shaddinger,* 97-439, p. 9 (La. App. 5 Cir. 10/28/97), 702 So. 2d 965, 970 **(emphasis added)**.

The 2006 judgment reversing the JNOV has indicia of both final and interlocutory judgments. It was not an appeal of the jury verdict, it was only an appeal of the JNOV. A similar situation to that herein was considered by this court in 1951. *Oliphint v. Oliphint,* 54 So. 2d 18 (La. 5/28/51). A judgment that concerned merit issues that did not resolve all of the open issues in the case was rendered, appealed and decided, but it left open ongoing issues and appeals. *Id.* The case was not concluded, but the defendant urged that res judicata compelled an immediate dismissal. *Id.* The *Oliphint* court stated:

> It is, of course, true that the judgment is not a final judgment in the sense that it is the last judgment to be rendered in the case. Therefore, it cannot be said to fit exactly within the definition of

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[25] Exhibit E.

> definitive judgments contained in Article 539 of the Code of Practice. On the other hand, it is apparent that it cannot be regarded as an interlocutory judgment, as defined by Article 538 of the Code of Practice, since it trenches upon the merits of the case and does not merely pronounce on preliminary matters in the course of the proceedings. Albeit, the judgment falls within that zone of decrees which are not defined in the Code of Practice but which really partake of final judgments in that they dispose of issues applicable solely to the merits of the case. The omission of provisions in the Code of Practice relative to this type of judgment has been heretofore commented upon by this court in a number of cases and **appeals from such judgments have been sanctioned.**

Id. at 789-90; *see Cary v. Richardson,* 35 La. Ann. 505 (La. 1883); *Garland v. Dimitry,* 114 So. 2d 718 (La. 1927).

Violation of Applicants' Right to Appeal

The plaintiffs' appeals in this case were pending and lodged, but were not yet briefed or argued at the time T&B's motion to dismiss was granted. In addition to the directive provided by the Fifth Circuit to the trial court and litigants to enter a new judgment

on the jury verdict in its 2007 dismissal of the appeal,[26] the Fifth Circuit, with the consent and concurrence of T&B, provided the following order to appellant Hayes and the trial court on September 4, 2007:

> IT IS ORDERED that the unopposed motion to dismiss unlodged appeal without prejudice to refile is granted, and the unlodged devolutive appeal of Terrance Hayes is dismissed without prejudice to refile after the entry of a replacement judgment by the trial court.
>
> Gretna, Louisiana, this 4th day of Sept., 2007.
>
> s/ Edwin Dufresne, Chief Judge"[27]

It is clear that the Fifth Circuit remanded this matter to the trial court for entry of judgment. When that new judgment was entered, a motion for new trial was filed, was later argued, heard, and granted. It cannot be reasonably questioned that the trial court was authorized and expected by the Fifth Circuit to enter a judgment in accordance with the jury verdict so that the matter could proceed in accordance with law. After entry, of a new judgment, the Code and jurisprudence permits the filing of a motion for new trial, and if not granted, the filing of the appeal. This Court has previously ruled that

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[26] Exhibit C

[27] Exhibit E

whenever there remain appeal rights that have not been exhausted, res judicata is inappropriate.

> We also find it significant that on June 10, 1992, the effective date of Act 237 of 1992, neither the judgment rendered by the trial court in *Rey,* nor that rendered by the trial court in *Segura,* were res judicata. Under the law of res judicata applicable in *Rey,*[34] "[a] final judgment is definitive when it has acquired the authority of the thing adjudged." La. C.C.P. art. 1842 (West 1990). "Thing adjudged" is defined in La. C.C. art. 3506(31) as "that which has been decided by a final judgment, ***from which there can be no appeal***, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal" (emphasis added). **Obviously, the trial court's judgment in *Rey* had not acquired the authority of a thing adjudged on June 10, 1992 because that judgment was then on appeal. Similarly, under the law of** res judicata **applicable in *Segura*, "a valid and final judgment is conclusive between the same parties, *except on appeal or other direct review. . .* "** La. R.S. 13:4231 (emphasis added).

> Because the trial court's judgment in *Segura* was on appeal on June 10, 1992, it was not conclusive-between the parties at that time.
>
> **In light of the foregoing, we conclude a claim is *pending* as long as it is *subject to judicial scrutiny.*** Even though a lower court has adjudicated a claim and rendered judgment, the claim continues to be pending until appeal of that judgment has been exhausted. Until then, something further remains to fix the plaintiff's right to enforce the claim as well as the defendant's obligation to pay it. In other words, a claim "pending appeal," as that phrase is commonly understood in a legal context, is a *pending* claim.

Segura v. Frank, 93-127 (La. 1/14/94), 630 So. 2d 714, 727 (emphasis in original).

Even though it did not do so herein, the Fifth Circuit has relied in the past on the analysis of the Supreme Court to *Segura v. Frank. See Mancuso v. Siegel,* 94-525, p. 7 (La. App. 5 Cir. 11/29/94), 646 So. 2d 1200, 1203-04. The situation we have herein, where the appeal of the jury verdict has never been completed because it was interrupted by a motion to dismiss based on res judicata, is far different from the *Tolis* case, which has been cited both by T&B and by the most recent Fifth Circuit panel herein:

> The intermediate court's judgment of March 29, 1994 dismissed plaintiffs' action in its entirety with prejudice, thereby deciding the merits of the case. That judgment was therefore a final judgment, which became res judicata and conclusive between the parties when it was rendered, although subject to modification by a higher court on direct review. La. Rev. Stat. 13:4231.

Tolis v. Board of Supervisors, 95-1529, p.3 (La. 10/13/95); 660 So. 2d 1206, 1207.

This Court has refused in the past to be lured-in by absurd "literal" readings of prior law:

> While a literal reading of La. Code Civ. P. art. 1673 would support Mr. Savoie's interpretation, we believe that construing an interlocutory judgment of dismissal based on venue as a final disposition on the merits would produce an absurd or unintended result under the facts of this case. The function of the court is to interpret the laws so as to give them the meaning which the lawmakers obviously intended them to have and not to construe them so as to give them absurd or ridiculous meanings. *Webb v. Parish Council of East Baton Rouge,* 217 La. 926, 47 So. 2d 718 (1950); *Smith v. Town of*

> *Vinton,* 209 La. 587, 25 So. 2d 237 (1946).
>
> The absurdity of a literal application of La. Code Civ. P. art. 1673 under the facts of this case is readily apparent . . . it has been held that this requirement is not satisfied when the merits of the underlying proceeding have not been reached. *See Irby v. Harrell,* 140 La. 828, 74 So. 163 (1917) (abandonment of prosecution as a result of a compromise is not the same as a termination of litigation in plaintiff's favor). Mr. Savoie's interpretation of La. Code Civ. P. art. 1673 would render this requirement meaningless and allow him to proceed on his malicious prosecution suit without a bona fide termination of the underlying proceedings.
>
> *Savoie v. Rubin,* 2001-3275, p.4 (La. 06/21/02), 820 So. 2d 486, 488.

This Court previously refused to allow courts of appeal to bar a plaintiff from appealing the trial court's judgment based upon res judicata.

> Granted. The court of appeal erred in finding principles of res judicata barred plaintiff from appealing the trial court's judgment. See La. R.S. 13:4231 ("a valid and final judgment is conclusive between the

> parties, except on appeal or other direct review"). The proper inquiry is whether relator voluntarily acquiesced in the trial court's judgment pursuant to La. Code Civ. P. art. 2085. Because the court of appeal did not consider this issue, we vacate the judgment of the court of appeal and remand the case to the court of appeal to determine, after appropriate briefing from the parties, whether relater's post-judgment actions constituted an acquiescence in the judgment.

Shadoin v. Shadoin, 2003-0042, p. 1 (La. 05/09/03); 847 So. 2d 1184.

This matter falls within one of the well-established exceptions to the general res judicata rules as previously outlined by this court:

> Although rarely mentioned, exceptions exist to the common law theory of res judicata, as noted in the Restatement (Second) of Judgments, § 26 (1982). These exceptions involve "exceptional circumstances" as where . . . **(c) there are restrictions on the subject matter jurisdiction of the courts** . . . Restatement (Second) of Judgments, § 26 (1982), pg 233-234, fn4.

Terrebonne Fuel & Lube v. Placid Ref. Co., 95-0654, p. 13 (La. 01/16/96); 666 So. 2d 624, 632 **(emphasis added)**.

There were restrictions on the subject matter jurisdiction of the Fifth Circuit at the time it concluded that the JNOV should be reversed, as the JNOV had replaced the only judgment on the merits in this case – the jury verdict. *See Junot,* 2002-0237, p. 3-4; 818 So. 2d at 156-157. The only matter before the Fifth Circuit at that time, and the only matter it could have decided in the posture of the case before it, was whether or not the JNOV should be affirmed or reversed. The Fifth Circuit concluded the JNOV should be reversed. *In re: Gramercy,* 04-1151, 927 So. 2d 492. That decision was challenged, and the challenge lost. The next step in the appeal process of this matter was to appeal the jury verdict, which had never been appealed. The Fifth Circuit ruled in 2007 that in order to perfect plaintiffs' appeals, the trial judge had to enter a judgment incorporating the jury verdict.[28] Both the 2007 panel and the Chief Judge signed judgments that made it clear that jurisdiction was returned to the trial court for entry of judgment[29] It is clear that the appeal process in this matter has never been completed and has additional steps, whether they begin with the new trial or recommence with the appeal.

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[28] Exhibit C.

[29] Exhibit E.

There are now four Fifth Circuit opinions in this matter related to the JNOV, appeal, and new trial issues that are inconsistent, dissonant and that cannot be harmonized.

1. March 28, 2006: The Fifth Circuit reversed the trial court's JNOV, conditional new trial, and reinstated the jury verdict. *In re: Gramercy*, 04-1151, 927 So. 2d 492.

2. January 16, 2007: The Fifth Circuit dismissed the plaintiffs' appeal before it was briefed due to absence of a trial court judgment from which to appeal and stated:

   > . . . an appeal can only be taken from a judgment of a trial court. In the present case, without a judgment of the trial court that adopts the original jury verdict, which does not presently appear in the record, Kaiser-AXA has no basis for appeal at this time. It would appear, however, this could be easily remedied by a motion from the defendant to the trial court."[30]

3. September 4, 2007: The Fifth Circuit dismissed Terrance Hayes' unlodged appeal without prejudice to refile it after the trial court was to enter a replacement judgment incorporating the jury verdict.

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[30] Exhibit C.

4. January 30, 2008: The Fifth Circuit granted T&B's writ, reversed the trial court's judgment granting new trial, denied Kaiser/AXA. and Hayes' motion for new trial, and stated:

> . . . our judgment, which reinstated the jury verdict, became final and definitive and acquired the authority of the thing adjudged . . . the judgment of the jury acquired the authority of a thing adjudged and was not subject to modification, revision or reversal on this issue, or **any other issue**."[31]

There is no previous statutory or jurisprudential authority that a reversal of a JNOV and a conditional new trial operates as a final decision on the merits of a jury verdict sufficient to trigger res judicata and to deny any appeal of the jury verdict. This decision is res novae and conflicts with established jurisprudence and statutory authority.

The Louisiana Supreme Court has affirmed, that the doctrine of res judicata is triggered only by a ***final*** judgment ***on the merits***. *Tolis v. Bd. of Supervisors of LSU*, 95-1529, p. 2 (La. 10/16/95), 660 So. 2d 1206, 1206-07, *citing* La. Code Civ. Pro. art. 1841. The original jury verdict judgment was vacated by the trial court's JNOV, and T&B's appeal of the trial court's JNOV was not a consideration of the merits of

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[31] Appendix 2 (**emphasis added**).

the jury verdict. *Junot v. Morgan,* 2002-0237, p. 3-4 (La. App. 1 Cir. 02/20/02), 818 So. 2d 152,156-157.

Preservation of and Applicants' Right to Appeal the Jury Verdict

The standards on appeal of JNOVs and jury verdicts are two very different standards, and are applied differently. When this Court or the Fifth Circuit reviews the jury trial record for reversible error, which it has never done, it will apply a *different* standard of review than that which it applied to the question of the propriety of the JNOV. The differences between the two standards are significant. *De novo* review, which is available and may well be applied to this case, would not depend to any degree on the jury verdict, but instead depends upon the evidence presented at trial, and the law.

The right of appeal is favored in Louisiana law. *Allen v. State of Louisiana through the Earnest N. Morial – New Orleans Exhibition Hall Authority, et al*, 2002-1072 (La. 04/09/03), 842 So.2d 373, 376, footnote 2. The right of appeal is lost only through the unconditional, absolute, and voluntary acquiescence in the judgment by the appellant, and only if the appellant evidences an intention to abandon the right. *Id.*, citing *Succession of Franz,* 116 So.2d 267, 268 (La. 1959). To the contrary, Hayes and Kaiser/AXA here are actively pursuing their right to appeal and are actively challenging the faulty trial court jury verdict and judgment, and have not, in any way,

acquiesced in the judgment or abandoned their rights. As the Louisiana Supreme Court long ago stated, "[t]he right to appeal is a precious one, and it should be favored and aided by the court." *Fitzpatrick v. Letten,* 49 So. 494, 497 (La. 1908).

Louisiana Code of Civil Procedure article 2082 provides,

> Appeal is the exercise of the right of a party to have a **judgment of a trial court** revised, modified, set aside, or reversed by an appellate court.

La. Code Civ. Pro. art. 2082 (2008).

The judgment Hayes/Kaiser/AXA has the right to appeal (in the absence of a new trial), the trial court's judgment incorporating the jury verdict, was never subject to being revised, modified, set aside, or reversed by an appellate court, until now. The Fifth Circuit has now wrongly declared that plaintiffs will never have the right to appeal the jury verdict. Until the "appeal as of right" has been allowed and completed or the case is re-tried as per the trial judge's order, a **final judgment on the merits** of the case has not been rendered.

The January 16, 2007 Fifth Circuit opinion herein, cited *Junot v. Morgan,* 2001-0237 (La. App. 1 Cir. 2/20/02), 818 So.2d 152 and followed its ruling. *Junot* is directly on point. In *Junot,* the First Circuit considered a jury verdict that had been amended by the grant of plaintiffs' JNOV. *Id.* In the present case,

as in *Junot*, Plaintiffs' JNOV also included an alternative motion for new trial. The trial court granted plaintiffs' JNOV and reapportioned fault, with a higher fault assigned to defendant Burger King, and increased both plaintiffs' general damage awards. The trial court denied Burger King's JNOV, *Id.* Burger King suspensively appealed *both the original judgment and the JNOV. Id.* The appellate court *dismissed as premature Burger King's suspensive appeal of the jury verdict,* which had been superceded by the JNOV and the new trial ruling:

> Because the trial judge granted plaintiffs' motion for JNOV, the jury's verdict was set aside. See La. C.C.P. art, 1811. Thus, the August 29, 2000 judgment rendered in conformity with the trial judge's rulings superseded the February 11, 2000 judgment which incorporated the jury's verdict. As such, at the time this appeal was lodged, the February 11, 2000 judgment was procedurally in abeyance. Therefore, when Burger King lodged its appeal of the February 11, 2000 judgment, it was requesting of this court a review of a judgment which was procedurally in abeyance and without legal effect since it is a judgment which purports to incorporate a verdict that was "set aside."

Louisiana Civil Code of Procedure article 1811E states:

> If the motion for a [JNOV] is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for a [JNOV]. If the appellate court reverses the judgment, nothing in this Article precludes the court from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted. (Emphasis added.)

Thus, the party who prevailed on the JNOV at the trial court level – but whose favorable JNOV determination is subsequently reversed on appeal – may be the subject of a ruling in the trial court on new trial grounds at the direction of the court of appeal. It follows that it is premature for an appellate court to consider an appeal of the judgment which incorporates the set-aside verdict at the same time it reviews the propriety of the trial court's ruling on the motion for JNOV. To do so has the potential effect of terminating the post-judgment rights of the parties, for example, the right to a new trial ruling in the trial court under

> La. C.C.P. art. 1811 E. When Burger King lodged this appeal of the February 11, 2000 judgment, that appeal was premature.
>
> An appellate court may dismiss an appeal for lack of jurisdiction on its own motion at any time. See La. C.C.P. art, 2162. Therefore, ***we dismiss as premature Burger King's appeal of the February 11, 2000 judgment incorporating the jury's verdict as this judgment has been set aside by the judgment dated August 29, 2000.*** We now address Burger King's contentions challenging the rulings of the trial judge on the parties' motions for JNOV.[32]

The procedure outlined by *Junot* has become part of hornbook law taught to law students.

In 1 La. Civil Law Treatise § 13.4, n.21 (2006), the holding of *Junot* is cited for the proposition that "the judgment on the jury verdict was 'procedurally in abeyance' when the appeal is lodged and that it is premature to consider the appeal of the judgment on the set aside verdict at the same time as consideration of the JNOV."

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[32] *Junot*, p. 4-5, 818 So.2d at 156-57 (**emphasis added**). *See also Strain v. Indiana Lumberman's Mut. Ins. Co.*, 2000-2720 (La. App. 1 Cir. 2/20/02), 818 So.2d 144; and *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 2/20/02), 813 So.2d 458, *writ denied*, 2002-1125 (La. 6/14/02), 818 So.2d 779.

Under the clear holding of *Junot,* Hayes, and Kaiser/AXA were precluded from appealing the correctness of the jury verdict while the JNOV was on appeal. Upon the reversal of the JNOV and upon the entry of judgment incorporating the jury verdict by the trial court, Hayes and Kaiser/AXA obtained the right to move for a new trial and/or appeal the jury verdict.

Louisiana Law does not Mandate an Appeal of a Vacated Judgment

Louisiana Code of Civil Procedure article 2082 provides that an appeal is the exercise of the right of a party to have a **judgment** of a **trial court** revised, modified, set aside, or reversed by an appellate court. La. Code Civ. Pro. art. 2082 (2008). The 2006 appeal was filed to appeal the reinstated jury verdict, as it had never been subject to being revised, modified, set aside, or reversed by an appellate court until after the JNOV was reversed and the jury verdict was reinstated. Judgments adopting the jury's verdict were presented and signed in February, 2002. Timely motions for new trial and for JNOV were filed thereafter. Both the motions for new trial and for JNOV were granted, which vacated the jury verdict (as per *Junot*). After the JNOV and the new trial motions were granted, there was no judgment on the jury verdict available to appeal. The JNOV and the new trial ruling were in favor of Hayes and Kaiser/AXA. There was no appeal of the jury verdict, because there was no judgment on the jury verdict to appeal.

Contrary to T&B's assertion that the Fifth Circuit already considered all aspects of an appeal of this case, Hayes and Kaiser/AXA never had an opportunity to raise the errors committed by the court below at trial, such as improper jury venire, improper jury selection, improper evidentiary rulings, violation by T&B of evidentiary rulings, mischaracterization of testimony by counsel, obtaining opinion testimony from lay witnesses, denial of mistrial motions, improper jury instructions, and/or any other trial errors that helped justify *de novo* review and/or create the manifest error that occurred at trial. The analysis regarding these legal errors is different from the analysis required in supporting the affirmance of the JNOV and/or new trial. Without the opportunity to address the merits of the jury verdict, no *final* judgment on the "merits" of the case exists.

An appeal from the jury's verdict's not a subsequent action. Hayes and Kaiser/AXA have not filed a new lawsuit. They have been appealing and challenging the original jury verdict against them. The Fifth Circuit's reversal of the JNOV completed the appeal of the JNOV, but no judgment was entered by the trial or the appellate court incorporating the jury verdict, and making the jury verdict the verdict of the court. The Supreme Court did not render a judgment on the merits, it refused to review the Fifth Circuit decision reversing the JNOV.

Assignment of Error No. 2

New Trial

There are no specific provisions in Louisiana law that prohibit a trial court from granting a second new trial. *Carlone v. Carlone,* 444 So. 2d 1274, 1276 (La. App. 4 Cir. 1984). The trigger for filing a motion for new trial is the entry of judgment. La. Code Civ. Pro. art. 1974 (2008). The Louisiana Supreme Court has held that a judgment granting or denying a new trial is an interlocutory judgment. *State ex rel Land v. Martin,* 207 La. 410, 21 So. 2d 481, 482 (La. 1945). A final judgment determines the merits in whole or in part; an interlocutory judgment does not determine the merits, but only preliminary matters in the course of the action. La. Code Civ. Pro. art. 1841 (2007). Therefore, no interlocutory judgment can be a **final judgment on the merits** sufficient to invoke res judicata. *Id.* The two concepts are opposite. Res judicata does not apply to new trial orders. Res judicata requires a final judgment, and the commentary that accompanies La. R.S. § 13:4231 requires that the final judgment be rendered on the merits. La. R.S. § 13:4231 cmt. (d) (2007). This Court has held that the doctrine of res judicata is triggered **only** by a final judgment on the merits. *Tolis*, 95-1529, p. 2, 660 So. 2d at 1206, *citing* La. Code of Civ. Pro. art. 1841.

The Code of Civil Procedure allows for the filing of a motion for new trial within seven business days of the entry of a new judgment. La. Code Civ. Pro. art.

1974 (2008). The court signed a new judgment and used T&B's new form of judgment, at T&B's request, on September 4, 2007.[33] A motion for new trial was timely filed on September 5, 2007. The motion for new trial was set for hearing, was heard, and the opinion granting it fulfilled every requirement of the Supreme Court ruling in *Horton*.[34] The trial judge was absolutely clear that he did not believe that the jury did substantial justice herein, and that the jury verdict should not be the judgment of the courts of Louisiana. He had the right under the Code of Civil Procedure, *Horton* and *Carlone,* to grant a new trial from T&B's new judgment. His reasons are lengthy and more than adequately fulfill the requirements for a discretionary new trial as set out by this court in *Horton.*

There is no adequate justification for reversing the granting of a new trial herein.

CONCLUSION

The Fifth Circuit has erred in its application of res judicata to the case at bar. Its error conflicts with Louisiana's legislative intent as evidenced by our Codes and Statutes, and conflicts with prior expressions of the law by this Honorable Court and other circuits, and prior Fifth Circuit jurisprudence from

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[33] Exhibit F.

[34] Appendix 1.

other cases and from this case. Manifest injustice will be done if the Fifth Circuit decision is allowed to stand, which would deny applicants any right to appeal the adverse jury verdict herein.

Applicants respectfully request this Honorable Court to grant writs, to reverse and/or vacate the Fifth Circuit Judgment that reversed the trial court's grant of new trial, and to reinstate the trial court judgment that granted a new trial, as per *Horton v. Mayeaux.*

In the alternative, applicants request this Honorable Court to reverse and/or vacate the Fifth Circuit's judgment and to reinstate the trial court judgment of September 4, 2007, that incorporated the adverse jury verdict, and to reinstate plaintiffs' right to appeal the September 4, 2007 judgment.

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SWISS REINSURANCE COMPANY,
WINTERTHUR INTERNATIONAL INSURANCE COMPANY,
ZURICH REINSURANCE COMPANY
in their own names and in the name
Kaiser Alumina & Chemical Corporation

Verification

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, personally came and appeared:

CALEB H. DIDRIKSEN

who, after being duly sworn, did depose and state:

That he is counsel for the plaintiff-applicant herein, that he has read the foregoing Application for Writs of Certiorari or Review, or Alternatively, Supervisory or Remedial Writs; that the allegations contained therein are true and correct to the best of his knowledge, information and belief; and that a copy of the Application (with Appendices) has been served by placing same in the United States mail, facsimile, or

other electronic means this 28th day of February, 2008:

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/s/ Caleb H. Didriksen
Caleb H. Didriksen

Subscribed and sworn before me, Notary, this 28th day of February, 2008.

/s/ Loyd J. Bourgeois, Jr.
Loyd J. Bourgeois, Jr.

La. Bar. No. 29771
My commission is issued for life.

[SEAL] LOYD J. BOURGEOIS, JR.
Notary Public
State of Louisiana
Notary ID # 84815/La. Bar
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[Attachments Omitted In Printing]

SUPREME COURT OF LOUISIANA

Docket No. 2008 CC 481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

On application for Supervisory Writ of Certiorari or Review from the Fifth Circuit Court of Appeal for the State of Louisiana
Docket No. 07-C-893

On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

Motion for Rehearing
Filed on Behalf of Respondents/Appellants Terrance Hayes, Kaiser Alumina & Chemical Corporation/AXA Global Risks, et al.

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Civil Case

Motion for Rehearing

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Exhibits

Exhibit A: Judgment of Louisiana Supreme Court, signed May 2, 2008 (denial of Applicants' writ)

Exhibit B: Ruling of the Louisiana Fifth Circuit Court of Appeal in No. 07-C-893 (dismissal of Applicants' appeal due to lack of trial court judgment adopting the original jury verdict)

Exhibit C: Ruling of the Louisiana Fifth, Circuit Court of Appeal in No. 07-C-893 (reversing trial court's grant of a new trial and dismissing Kaiser/AXA and Hayes' appeal)

SUPREME COURT OF LOUISIANA

Docket No. 2008 CC 481

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

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On Application for Supervisory Writ of Certiorari or Review from the 23rd Judicial District Court, Parish of St. James State of Louisiana
Honorable Pegram J. Mire, Jr., Judge, Presiding
Docket No. 25,975

MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Applicants Terrance Hayes and Kaiser/AXA, through undersigned counsel, request that this Honorable Court reconsider its decision rendered May 2, 2008, which effectively denied the Applicants' due process right to appellate review of the jury's verdict in this matter, which was vacated by the trial court's judgment notwithstanding the verdict (JNOV) and reinstated upon reversal of the trial court's JNOV by the Louisiana Fifth Circuit Court of Appeal.

Applicants acknowledge that this Court's Rule IX, Section 6 prevents the use of rehearing when this Court has merely granted or denied an application for

writ of certiorari. However, in light of the violation of the Applicants' Due Process and Equal Protection rights afforded by both the United States Constitution and the Louisiana Constitution, this case warrants the extraordinary remedy of reconsideration by this Honorable Court. Chief Justice Calogero voiced his concerns regarding this issue in his reasons for granting Applicants' writ, stating "[n]o appellate court has yet examined the merits of the jury verdict," and that he would grant writ in this matter "to permit further proceedings, including an appeal therefrom." Chief Justice Calogero also noted that this Court did not address whether an appeal from the merits would lie from a reinstated jury verdict in *Vasalle v. Wal-Mart Stores, Inc.*, which is sufficient to grant writ in this matter in order to resolve ambiguity.

While the United States Supreme Court has long held that a "right" to appeal is not found in the United States Constitution, the Court has held that where a state provides a process of appellate review, the procedures must comply with the constitutional dictates of Due Process and Equal Protection. *See McKane v. Durston*, 153 U.S. 684 (1894), *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The right of appeal is constitutionally guaranteed by the Louisiana Constitution. Art. VII, §§ 10 and 29; *Succession of Damico*, 109 So. 402 (La. 1925). Louisiana provides its process of appellate review in La. C.C.P. art. 2082:

> Art. 2082. Definition of Appeal
>
> Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court.

An appeal as such is the exercise of the constitutional right enjoyed by a litigant to have an adverse judgment of a trial court revised, modified, reversed or set aside by an appellate court. La. C.C.P. 2082. *Darouse et al. v. Andrew Mamon, Jr.*, 201 So. 2d 362 (La. App. 1 Cir. 1967).

> To dismiss an appeal is to refuse to entertain it. An appellate court may refuse to entertain an appeal (1) when it has no appellate jurisdiction therein; (2) when the appeal was not taken or perfected in time; (3) when the judgment below has been confessed or consented to; (4) when said judgment has been acquiesced in by voluntary execution thereof; (5) when the terms upon which the appeal has been granted have not been complied with; (6) when there is no appeal for want of an order granting an appeal; and (7) when the judgment, if definitive, has not been made executory by the signing thereof. La. Code Prac. art. 546; La. Code Prac. art. 567; La. Code Prac. art. 574; La. Code Prac. art. 587; and La. Code Prac. art. 593. But otherwise, in civil cases, an appeal lies of right from all final judgments, and also from such interlocutory judgments as may cause irreparable injury, La. Code Prac. art. 565, La. Code Prac. art. 566, La. Code Prac. art. 575,

> La. Code Prac. art. 578, La. Code Prac. art. 580, except in cases tried before a district court, in the country parishes, involving $ 100 or less, La. Const. art. VII, §§ 29, 48 (1921).

Succession of Damico, 161 La. 725 (La. 1925). As Justice Calogaro wrote in his dissent, the Fifth Circuit and this Court have now effectively violated Applicants' right to appeal an adverse verdict. Applicants have never had the right to have the adverse jury verdict reviewed by an appellate court, as is their constitutional right in Louisiana. On January 16, 2007, the Louisiana Fifth Circuit adjudged that Applicants did have a right to appeal, and that the appeal was premature because there was no trial court judgment adopting the jury verdict, as the prior judgment adopting the jury verdict had been vacated by the grant of a JNOV. The recent Fifth Circuit judgment dismisses the appeal without this ever being heard, along with the second new trial, in violation of Applicants' constitutional rights of Due Process and Equal Protection. This Court's failure to remedy the constitutional violations created by the Louisiana Fifth Circuit is a floodgate, which invites further dismissals of appeals in violation of both the United States and Louisiana's constitutions. This is the first case Applicants have located in which a party who timely took all reasonable steps to invoke their right of appeal has been denied any review by an appellate court of that adverse jury verdict. The trial court who swore in the jury and who presided over the trial believed this jury verdict to be so flawed that he granted a JNOV and granted new trials not

once, but twice. This flawed jury verdict has never been appealed, and without the assistance of this Court or of the United States Supreme Court, these litigants will be denied their constitutional right "to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." Justice Calogaro [sic] recognized the impact of these decisions on this $500 million dollar case. Applicants respectfully request a rehearing and another review and protection by this court of their constitutionally guaranteed right of appeal.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing pleading has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 16th day of ~~February~~ May, 2008:

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STATE OF LOUISIANA

PARISH OF ORLEANS

Verification

BEFORE ME, the undersigned notary, did come and appear:

Caleb H. Didriksen

who, after being duly sworn, did depose and say that he is counsel for a plaintiff-applicant herein, that he has read this motion for rehearing and that the allegations contained therein are true and correct to the best of his knowledge, information and belief; and

that a copy of this motion for rehearing and its attachments has been forwarded to all counsel of record addressed as follows by placing same in the United States mail, facsimile, or other electronic means this 16th day of May, 2008:

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My commission is for life

[Attachments Omitted In Printing]